United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-1791

United States Court of Appeals
FOR THE SECOND CIRCUIT

GAJON BAR & GRILL, INC. and JAMES FRANCIONE
Plaintiffs-Appellees,

against

EUGENE KELLY, individually and in his capacity as Police Commissioner of the County of Suffolk, State of New York,
Defendant,

and

PAUL J. FITZPATRICK, individually and as Supervisor of the Town of Smithtown;

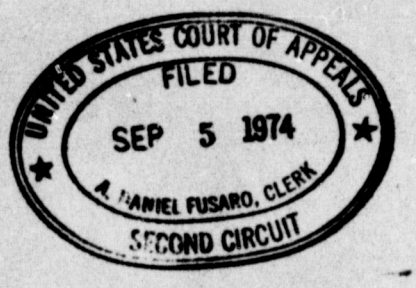
VINCENT J. TRIMARCO, individually and as Town Attorney of the Town of Smithtown,
Defendants-Appellants,

and

ROBERT HOSS, individually and as a member of the Suffolk County Police Department; and EMIL ORTOLANI, individually and as a member of the Suffolk Police Department,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLANTS



HOWARD E. PACHMAN
Special Counsel to Defendants-Appellants Paul J. Fitzpatrick and Vincent J. Trimarco
6143 Jericho Turnpike
Commack, New York 11725
(516) 864-5900

TABLE OF CONTENTS

TABLE OF CASES

PAGE

PAGE

STATUTES CITED

United States Court of Appeals
FOR THE SECOND CIRCUIT

GAJON BAR & GRILL, INC. and JAMES FRANCIONE
Plaintiffs-Appellees,

against

EUGENE KELLY, individually and in his capacity as Police Commissioner of the County of Suffolk, State of New York,
Defendant,

and

PAUL J. FITZPATRICK, individually and as Supervisor of the Town of Smithtown;

VINCENT J. TRIMARCO, individually and as Town Attorney of the Town of Smithtown,
Defendants-Appellants,

and

ROBERT HOSS, individually and as a member of the Suffolk County Police Department; and EMIL ORTOLANI, individually and as a member of the Suffolk Police Department,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLANTS

Statement

This is an appeal from an order of Honorable Walter Bruchhausen dated May 2, 1974, declaring that Local Law No. 1—1973 of the Town of Smithtown, County of Suffolk, State of New York, is on its face unconstitutional and that the defendants and the defendants-appellants, and each and every one of them, be enjoined from prosecuting the

plaintiffs-appellees for any violation of said Local Law No. 1—1973 or in any way interfering with the activities which may be prohibited by said Local Law No. 1—1973.

Facts

Paul J. Fitzpatrick and Vincent J. Trimarco are Supervisor and Town Attorney of the Town of Smithtown, a municipality located in Suffolk County, New York; Eugene Kelly is the Suffolk County Police Commissioner; and Robert Hoss and Emil Ortolani are members of his uniform force.

In the exercise of its authority, under Chapter 40 of the Laws of the State of New York, for the year 1970, which amended sections 245.01 and 245.02 of the New York State Penal Law,* the Town of Smithtown adopted Local Law No. 1—1973** (A 40a), which reads in part that:

> "§ 15-1. Clothing requirements.
> It shall be unlawful for any female to appear in public clothed or costumed in such a manner that the portion of her breast below the top of the areola is not covered with a fully opaque covering. Any person shall be guilty of violating this section who, in any capacity, knowingly directs, gives, manages, participates in, prepares or presents, or who employs others so to do any live public show in which a female appears clothed or costumed in such a manner that the portion of her breast below the top of the areola is not covered with a fully opaque covering."

On or before March 16, 1974, the Gajon Bar and Grill, Inc., under the active management of James Francione,

---

* 39 McKinney's Cons. Laws of N.Y., Book 39, Penal Law §§ 245.01, 245.02.

** Chapter 15-Entertainment Regulations, Code of the Town of Smithtown.

began to provide live female entertainment, commonly known as topless dancers, at their bar which is known by its trade name, Red Velvet Lounge. On March 16, 1974 at 1:30 A.M., Patrolman Hoss arrested Leslie Brook Bank, a topless dancer, and James Francione, as manager, and criminal proceedings were commenced in the Suffolk County District Court. Plaintiffs-appellees' attorneys in the federal court proceedings and the state district court criminal proceedings are the same. Later that day, at 1:30 P.M., Patrolman Ortolani arrested Beth Anne Magazzo, a topless dancer, and James Francione, as Manager. Criminal proceedings were commenced in Suffolk County District Court with the same attorneys appearing for Magazzo as did for Francione and Bank (A 30a, A 32a).

The cases were set down for trial, after arraignment, by the Suffolk County District Court for April 25, 1974 and May 2, 1974, respectively.

During the course of the criminal proceedings, and prior to trial, James Francione, the aforesaid criminal defendant, commenced a federal declaratory proceeding in the U. S. District Court, Eastern District, joined by the corporate owner, Gajon Bar and Grill, Inc., as co-plaintiff; the latter had not been charged in the state criminal proceedings (A 16a). (The topless dancers were not named party-plaintiffs in the federal declaratory proceeding.)

Exclusive of damages, the declaratory judgment relief set forth in the complaint was the following:

> A) A declaratory judgment that Local Law No. 1—1973 of the Town of Smithtown, New York, is unconstitutionally violative of the First and Fourteenth Amendments to the United States Constitution on its face and as applied.
>
> B) A permanent injunction prohibiting the defendants, their agents, servants, employees and anyone acting under their or succeeding to their positions,

from in any way enforcing Local Law No. 1—1973 of the Town of Smithtown, New York, with respect to plaintiff's premises where entertainment is provided by dancers with breasts not covered with a fully opaque covering.

C) An injunction enjoining defendants and/or their employees and/or persons acting under their direction and/or control from continuing the prosecution of plaintiff, James Francione, and plaintiff's employees, Leslie Brook Bank and Beth Anne Magazzo. (A 22a)

The plaintiffs-appellees more specifically claim and allege that their rights are violated pursuant to 42 U.S.C.A. 1983 and that the application of Local Law No. 1—1973 placed them in danger of irreparable harm because the law, by its broad terms, was discriminatory on the basis of sex and had a chilling effect on the free exercise of their first amendment rights and the public's right to view and be entertained by topless dancers. They coupled their action for declaratory relief with a request for a temporary injunction which was returnable by an order to show cause (A 3a).

The defendants-appellants' opposition was four-fold:

1) The District Court should exercise restraint and abstain from undue interference with a state criminal proceeding already pending against the plaintiffs-appellees at the time the federal complaint was filed.

2) That a three-judge court is required pursuant to 28 U.S.C.A. 2281 because Local Law No. 1—1973 has statewide application and is indicative of New York State's Legislature policy and a single federal judge should not declare such policy unconstitutional.

3) That the corporate federal plaintiff, as principal, is in privity with the defendant, James Francione, as agent manager, in the state court criminal proceedings and has

no greater standing to request a federal declaratory judgment.

4) That Local Law No. 1—1973 is neither vague, overbroad facially or in its application.

POINT I

Since a state criminal proceeding was pending, the temporary injunction issued by the district court must be dissolved and the complaint dismissed upon the constraint of *Younger* v. *Harris*.

At the inception of the federal declaratory proceeding in the district court, Eastern District, on March 16, 1974, state criminal proceedings were pending against the federal plaintiff James Francione (A 31a, 33a).

When such a state criminal proceeding is pending against a federal plaintiff at the time the federal complaint is filed, unless bad faith enforcement or other special circumstances are demonstrated, the principles of equity, comity and federalism preclude the issuance of a federal injunction restraining enforcement of a criminal statute and, in all but unusual circumstances, a declaratory judgment upon the constitutionality of the statute. *Steffel* v. *Thompson*, —— U.S. ——42 L.W. 4357 (U.S. March 20, 1974) 4358.

Steffel v. *Thompson* re-examined, reaffirmed and redefined the sextet of cases previously decided by the Supreme Court in 1971 and popularly denominated under the lead case *Younger* v. *Harris*, 401 U.S. 37 (1971).[1]

This Court in its decision in *Salem Inn, Inc.* v. *Frank*, —— F.2d ——, No. 73-2436 (2d Cir., June 25, 1974), slip

---

[1] *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971); *Byrne* v. *Karalexis*, 401 U.S. 216 (1971).

op. 4405, postulated the following rule at p. 4412:

> ". . . The fact of which court is first presented with the question seems a clear-cut, reliable, and equitable guide to which court should adjudicate the merits. Generally, this should result in the most speedy disposition of the merits which is in both the state's, here the municipality's, and the private party's interest . . . The certainty of where the power of adjudication properly lies, moreover, is likely to save all court's substantial time."

This rule was enunciated after the Court had the benefit of *Steffel* v. *Thompson, supra,* the U. S. Supreme Court's latest ruling on the issue of a federal court's abstention vis a vis state court's pending criminal proceeding.

We now turn to Judge Bruchhausen's decision to cull his summary findings of fact, which were found without a hearing and necessary substantiation, and see that it does not meet the litmus test set forth in the tandem cases of *Younger* v. *Harris, supra,* and *Steffel* v. *Thompson, supra.*

(I)

It is undisputed that state criminal proceedings were pending against James Francione for violation of the ordinance occurring on two separate times on March 16, 1974, viz.: 1:30 A.M. and 1:30 P.M. of that date.[2] The actions were pending some ten days before the federal action was commenced on March 26, 1974 in the court below. Thereafter, concededly, an attempted arrest was made of the federal plaintiff, Francione, but it was aborted when the dancer was revealed to be a male. Thereafter, the male topless dancer continued to dance without interruption, hindrance or harassment (A 43a), until Judge Bruch-

---

[2] Criminal proceedings were also initiated against topless dancers, Leslie Brook Bank (1:30 A.M.) and Beth Anne Magazzo (1:30 P.M.).

hausen's injunction became effective, and the topless girls returned to their previous routines.

The district court tacks on two arrests of federal plaintiff, Francione, which occurred in the year 1972 (A 52a), when he was arrested under a predecessor ordinance, Local Law No. 1—1970, which was similar to Local Law No. 1—1973. That proceeding was dismissed when the local criminal court ruled that the Local Law No. 1—1970 was adopted prior to September 1, 1970 the effective date of the Legislature's enabling legislation, although it was to be effective September 1, 1970. The federal plaintiff was not subject to any arrests or harassments under the struck down law, Local Law No. 1—1970. On the contrary, the town, in good faith, took the necessary and required statutory steps to adopt a new local law, to wit: Local Law No. 1—1973 so as to comply with the court's ruling.

Judge Bruchhausen's decision attempted to find harassment and bad faith where none existed. There is nothing in the record to suggest that the commencement of the state criminal prosecutions were other than a good faith attempt to enforce the town's ordinance.

It would appear that the court was attempting to shape its decision within the exception of *Younger* v. *Harris*, 401 U.S. 37 (1971), as was exemplified in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). This was a landmark decision wherein the Supreme Court found it necessary to permit federal intervention in pending state criminal proceedings where there is a vague or over-broad statute regulating First Amendment freedoms of such an extraordinary nature as to require federal action.

The facts of *Dombrowski* v. *Pfister* and the case at bar are clearly distinguishable. Even if we concede the district court's acceptance of all the plaintiffs-appellees' alleged facts as being true, without contradiction, they do not meet the *Dombrowski* standards. That case involved a Louisiana Subversive Activities and Communist Control

Law and required the registration of Communist organizations. The plaintiffs were civil rights organizations, who alleged the arrest of individuals, the raiding of their offices, illegal search and seizure of records and continuing threats of prosecution after invalidation of arrest warrants and the continued threatened use of suppressed evidence.

The facts alleged in the case at bar are clearly distinguishable from the exceptional facts in *Dombrowski* and obviously not indicative of bad faith enforcement or harassment by municipal officials. See also *Krahm* v. *Graham,* 461 F.2d 703 (9th Cir., 1972).

(II)

The court then alluded to the fact that there was no indication as to when the state criminal proceedings would be terminated (A 56a).

Though possible oversight, the court ignored the colloquy of court and counsel which occurred on the return date of the order to show cause for the temporary injunction:

> "Mr. Steindler: We have a date of April 25th for only one of the cases; a May 2nd date for another and if for some reason the first case isn't tried on April 25th it would be something in July. This is one of our additional reasons for applying to this court, that we are not going to be able to resolve that rapidly in a state proceeding.
>
> The Court: I would make every effort to render a a ruling by that time.
>
> Mr. Pachman: To accommodate Mr. Steindler I'll do everything possible to see that they are ready to try that case and I believe Mr. Sweeney representing the police department will do everything in his power to get the police ready on that date so they could have their state proceeding which is our argument. They should be in the state court. I think we'll do every-

thing possible to try the case if Mr. Steindler would be ready with his client." (see addendum to brief, p. 27, *infra*)[3]

Thereafter, the attorneys for the respective parties, in the state criminal proceedings, agreed to obviate the trials by submitting to the criminal court issues on stipulated facts to include all the pending criminal procedings and to expedite the disposition. In fact, the brief on behalf of the criminal defendants was submitted to the Suffolk County District Court. The municipality had one week to respond, but never did because of the intervening temporary injunction of Judge Bruchhausen dated May 2, 1974 enjoining the proceedings.

The record belies the conclusion of the court below that there was no indication as to when a final determination will be made in the state criminal proceedings (A 56a).

(III)

The normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. *Boyle* v. *Landry,* 401 U.S. 80 (1971). In addition, the pending state prosecution provided the federal plaintiff with concrete opportunity to vindicate his constitutional rights and is a defense in his criminal prosecutions. *Younger* v. *Harris,* 401 U.S. 37 (1971).

Principles of equity govern federal orders enjoining state proceedings, and federal courts should, therefore, refuse to grant an injunction unless irreparable injury is demonstrated. In the case of state criminal prosecutions, the injury must be both great and immediate. The cost, anxiety, and inconvenience of defending against a single state prosecution do not constitute such injury. The threat to plaintiff's federally protected right must be one that could not be eliminated by his defense against a

[3] Hearing Transcript, page 4, April 4, 1974 before Hon. J. Bruchhausen, Hearing for preliminary injunction.

single state criminal prosecution. Plaintiff must be able to demonstrate that the prosecution was undertaken in bad faith. *Krahm* v. *Graham,* 461 F.2d 703 (9th Cir., 1972).

Since the federal plaintiffs had failed to establish any of the exceptions contained in *Younger* v. *Harris, supra,* the District Court erred in granting an injunction staying the pending state criminal proceeding.

POINT II

Gajon Bar & Grill, Inc. is in privity with the criminal defendant, James Francione, in the state criminal proceedings and therefore, is barred under the principles of *Younger* v. *Harris* from maintaining a federal declaratory proceeding.

The federal plaintiff, Francione, is the employee and managing agent of the corporate owner, Gajon Bar and Grill, Inc. The financial connection between the two federal plaintiffs is self-evident:

> "My employer is in no financial position to continue my employment unless I can maintain the business at the level which occurs which (sic) such entertainment is presented." (A14a)

Thus, the corporate-owner Gajon Bar and Grill, Inc. can be assured that its manager-agent, James Francione, who are both represented by the same counsel, would pursue a prompt and proper adjudication of the criminal proceedings in the state courts. The concern to have single counsel suggests a calculated plan that the defense of James Francione in the pending state criminal proceeding would be defended with the same vigor as exhibited in the presentation of the federal litigation. Obviously, the issues raised herein are properly litigable and are appropriate defenses in the state criminal proceeding. The propriety of arrests and the admissibility of evidence in state criminal prosecutions are ordinarily matters to be

resolved by a state tribunal. *Perez* v. *Ledesma,* 401 U.S. 82 (1971).

Since the state criminal proceeding was pending prior to the institution of the federal declaratory proceeding, and the litigation contains the same parties and/or those in privity with them, the district court should have abstained. *Joseph* v. *Black,* 482 F.2d 575 (4th Cir., 1973), cert. denied —— U.S. ——, 42 L.W. 3593. See also *Cherbonnie* v. *Kugler,* 359 F.Supp. 256 (N.J. D.C. 1973) and *Starshock, Inc.* v. *Shusted,* —— F.Supp. —— (N.J. D.C. (Trenton), Index #1806—1973, July 29, 1974), wherein it was held that:

> "The argument that the plaintiff corporation was not indicted so as to distinguish this matter from Younger is pure sophistry . . ."

The result reached in *Salem Inn, Inc.* v. *Frank,* —— F.2d ——, No. 73-2436 (2d Cir., June 25, 1974), slip op. 4405, by this Court is consistent with the result that defendants-appellants urge upon this Court. In granting the injunction in *Salem Inn, Inc.* v. *Frank, supra* (p. 4412), this Court attempted to render equality of treatment to all the parties who stood before it; *all of whom had instituted federal proceedings prior to institution of the state criminal proceeding.* The court acted in furtherance of conserving judicial energy; hence, it was more judicious for the court to act. The converse will be achieved in this case by the denial of the injunction and the permitting of the state criminal proceeding to go ahead unheeded. The two federal plaintiffs are enmeshed economically; by reason of their privity, they stand as equals in the prior pending state criminal proceedings.

When a state criminal proceeding is pending, considerations of equity, comity and federalism have substantial vitality and, therefore, mandate the denial of the injunction granted to the corporate plaintiff, the alter ego of the state criminal defendant; to do otherwise would undercut the principles of *Younger* v. *Harris,* 401 U.S. 37 (1971).

POINT III

The limiting and/or clarifying construction placed upon Penal Law, Sec. 245.01 by the New York Courts removes the constitutional question from consideration by this Court.

(I)

Local Law No. 1—1973 derives its sanction from the statewide application and authority of Penal Law 245.01. This particular section of the Penal Law was scrutinized by the New York State Court of Appeals and was sustained. *People* v. *Price,* 33 N.Y.2d 831, 351 N.Y.S.2d 973, which reversed an affirmance of an order of the Appellate Term, First Department, entered December 11, 1972, one justice dissenting, a judgment of the Criminal Court, New York County rendered August 11, 1971, convicting the appellant, Cheryl Lee Price, after trial, of exposure of a female (Penal Law 245.01). The operative facts may be gleaned from the dissenting opinion of Mr. Justice Markowitz:

> "The complaint alleged that the complaining officer saw defendant walking on Aug. 5, 1971, at 5:30 P.M. at 2nd Avenue and East 12th Street, Manhattan, 'wearing a dress in such a manner that the entire areola and nipple were exposed.' His partner testified that on the date and time referred to defendant was wearing 'a fishnet type pullover (a mesh pullover) with wide openings which made the breasts fully visible to the public.' The diamond-shaped openings were about ½ an inch. Being a pullover type, there were no buttons or zippers. The officers were in a squad car at the time. There was no crowd before the arrest."

The Court of Appeals reversed the affirmance in the following opinion:

> "The order of the Appellate Term should be reversed,

and the information dismissed. Statutes punishing indecent exposure, though broadly drawn, must be carefully construed to attack the particular evil at which they are directed (Matter of Excelsior Pictures Corp. v. Regents of Univ. of State of N.Y., 3 N.Y.2d 237, 244-245, 165 N.Y.S.2d 42, 144 N.E.2d 31). Section 245.01 of the Penal Law was aimed at discouraging 'topless' waitresses and their promoters (see Practice Commentary by Denzer and McQuillan, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 245.01, p. 200). It should not be applied to the noncommercial, perhaps accidental, and certainly not lewd, exposure alleged (see People v. Ulman, 258 App. Div. 262, 263, 16 N.Y.S.2d 222). Certainly, legislation may not control the manner of dress, absent commercial exploitation of exposure, or absent conduct or dress under circumstances creating or likely to create public disorder."

Thereafter, the Appellate Term, Second Department in *People* v. *Hardy* (N.Y. Law Journal, June 5, 1974, p. 19, col. 1), one justice dissenting, concluded:

"Judgment of conviction reversed on the law and facts, complaint dismissed and fine remitted.

Defendant was charged with violating Penal Law section 245.00 in that she was sunbathing in the nude on a public beach along with several other persons. Under the law nudity in itself is not prohibited and lewdness cannot be presumed from the mere fact of nudity. There must be a showing of lewd conduct from which the intention to act in a lewd manner can be drawn. Since no evidence was introduced establishing that defendant had intentionally exposed her private parts in a public place in a 'lewd manner' or otherwise committed a 'lewd act', her guilt was not established beyond a reasonable doubt (People v. Gilbert, 72 Misc. 2d 75; cf., People v. Price, 33 N.Y.2d 831; Matter of Excelsior Pictures Corp. v. Regents

of the University of the State of New York, 3 N.Y.2d 237, 242; People v. Ulman, 258 App. Div. 262)."

Two Appellate Courts of New York having narrowly defined Penal Law section 245.01. This has no less been the case when the local criminal courts were called upon to rule on the anti-topless ordinances. *People* v. *Moreira*, 70 Misc.2d 68, 333 N.Y.S.2d 215.

A similar local ordinance to the one at bar was determined to be constitutional in *Brandon Shores, Inc.* v. *Inc. Village of Greenwood Lake* (Sup. Ct.), 68 Misc. 2d 343, 325 N.Y.S.2d 957. This case was noted in this Court's opinion of *Salem Inn, Inc.* v. *Frank*, —— F2d ——, No. 73-2436 (2d Cir., June 25, 1974), p. 4413 n. 6 regarding the overbreadth of the ordinance in question. It is respectfully suggested that this Court may desire to reevaluate its position in light of *People* v. *Price, supra,* and *J.D.H. Rest. Inc.* v. *N.Y. State Liquor Authority*, 21 N.Y.2d 846, 288 N.Y.S. 2d 1003, which affirmed without opinion 28 A.D.2d 521, 379 N.Y.S.2d 975; apparently, this court did not acknowledge the existence of the New York Court of Appeals cases when it rendered its opinion.

The New York Courts used hornbook construction which limits, clarifies and interprets statutes and/or ordinances so as to avoid the necessity of reaching a federal question; the narrow definition put on the statute is that "the commercial exploitation of exposure." (*People* v. *Price, supra*), and the "bald attempt to profit on indecent exposure and drink," (*J.D.H. Rest. Inc.* v. *N.Y. State Liquor Authority, supra*), is conduct properly proscribed and thereby prohibited by a state penal statute and ergo the Local Law No. 1-1973.

(II)

The New York State Courts are not singular in their prohibition of topless dancing in bars. If we cross the Hud-

son River to New Jersey, Pennsauken, Camden County, we find that New Jersey Lewdness and Obscenity statutes are being employed by the Camden County Courts and the Trenton District Court to restrict topless dancing. Although the problems are similar, the courts are reaching a different conclusion on the nuances of *California* v. *LaRue,* 409 U.S. 109 (1972), from that reached by this Court in *Salem Inn, Inc.* v. *Frank,*——F.2d——No. 73-2436 (2d Cir., June 25, 1974, Slip Op. 4405.)

The initial litigation is reported in *Cherbonnie* v. *Kugler,* 359 F.Supp. 256 (D.C.N.J. 1973) and the facts and allegations have a strikingly similar cast:

> Plaintiffs are waitresses and employees of the Club Lido, its corporate owner, stockholder, manager, entertainers and a patron. The defendants are the State Attorney General, the County Prosecutor, the State A.B.C. Board and other law enforcement officials.
>
> Plaintiffs contend that the statutes and regulations under attack facially violate the first and fourteenth amendment to the federal Constitution in that the proscriptions therein infringe on their freedom of expression and, alternatively, are void for vagueness, with respect to the activity of topless dancing conducted for the entertainment of patrons of Club Lido.
>
> Defendant claimed that the statutes were facially constitutional and the court should refrain under the constraints of the abstention doctrine.

The Court considered the application of *California* v. *La Rue,* 409 U.S. 109 (1972) and abstained and made the following additional finding:

> "Moreover, inasmuch as a constitutional interpretation of the Lewdness Statute may be possible, and since there are presently pending in the State Superior Court a number of criminal cases in which the statutes herein involved are being challenged on

> a constitutional basis, the state courts should be afforded the initial opportunity to so interpret them. Consequently, we abstain." at p. 260.

At this juncture, the matter came to a temporary halt. On February 8, 1974, the District Court in Trenton, rendered a decision under the caption *Starshock, Inc.* v. *Shusted,* —— F.Supp. —— (D.C. N.J. Index #1805/73) which once again brings the Club Lido into Court with many of the same parties and others in their representative capacities, but without the Alcoholic Beverage and Control Board, as a party defendant, since the liquor license was suspended.

The Club Lido had reopened under the banner: "Nude Interpretive Dancing—No Alcoholic Beverages Sold."

An action for declaratory judgment was commenced to enjoin the municipality from interfering with the Club's introduction of this form of entertainment into the local community.

The Court framed the following issue:

> "Is 'nude interpretive dancing' embraced within the guarantee of freedom of speech under the First Amendment to the United States Constitution?"

The Court reviewed the current trend of the law in this area and concluded:

> "The Supreme Court has taken a similar position with regard to the power of the state to limit gross sexual conduct devoid of any, or very minimal, elements of expression. *Miller* v. *California, supra,* at 26 n. 8; *California* v. *La Rue,* 409 U.S. 109, 117 (1972).
>
> It is determined that the performances offered at the Club Lido fall far short of presenting an issue of 'speech' sufficiently important to outweigh the State of New Jersey's interest in curtailing nudity in public places . . . Although advertised as 'Nude Interpretive

> Dancing,' it was neither interpretive or dancing—just nude, a 'Go-go' performance bereft of outer dress. What we have here is a cheap exploitation of human sexuality for purely commercial purposes.
>
> * * *
>
> Plaintiffs' motion for a Preliminary Injunction will be and hereby is denied."

On appeal, the Third Circuit Court of Appeals remanded the matter to the District Court for further proceeding because plaintiff was not given an adequate opportunity to present its cause to the District Court. The appeal was only decided on procedural grounds. *Starshock, Inc.* v. *Shusted,* —— F2d —— (Index # 74-1165, 3d Cir., April 30, 1974).

The case was then reheard by the District Court and on July 29, 1974, after a hearing, the court rendered its decision. *Starshock, Inc.* v. *Shusted,* —— F.Supp. —— (D.C. N.J. Trenton, Index #1806/73).

> "I found nothing in the testimony or in my view of the performance which would differentiate my view from that of the Chief Judge earlier. The State certainly has the power to limit, control the type of activity under consideration. *Miller* v. *California,* 413 U.S. 15 (1973).
>
> I agree with the views expressed by the Chief Judge and only emphasize that we are dealing in the area of conduct rather than speech."

(III)

Judge Bruchhausen in striking down Local Law No. 1—1973 stated:

> "This law is so broad that it sweeps within its ambit other activities that in the ordinary circumstances constitute an exercise of freedom of speech." (A57a)

The Court below was in error when it did not recognize the principles set forth in *United States* v. *O'Brien,* 391 U.S. 367 (1968), 376.

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

This was reasserted by the Court in *California* v. *LaRue,* 409 U.S. 109 (1972), 117:

> "But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of 'conduct' or 'action'."

POINT IV

The district court should have convened a three-judge court to determine the constitutionality of a state law having state-wide application.

On April 10, 1974 the defendants, Fitzpatrick and Trimarco, made application to the district court to convene a three-judge court pursuant to 28 U.S.C.A. 2281. The court denied the application on the authority of *Boraas* v. *Village of Belle Terre,* 476 F.2d 806 (2d Cir., 1973) reversed on other grounds —— U.S. ——, 42 L.W. 4475, in that Local Law No. 1—1973 was a local law having no state-wide application.

The Village of Belle Terre, under the general grant of powers enunciated in Article 7, McKinney's Cons. Laws, Book 63, Village Law 7-700 et seq., under the aegis of promoting the health, safety, morals or general welfare of the community adopted a specific local zoning law against house occupancy in that village by "groupers" and known as the "Anti-grouper Ordinance." It had local application solely to that village and was not indicative of a state-wide policy.

This is not the case with Local Law No. 1—1973, declared unconstitutional by Judge Bruchhausen; he acted alone and in contravention of 28 U.S.C.A. 2281, which was enacted specifically to guard against a single federal judge from strking down a state's legislative policy. 1 Moore's Manual Federal Practice and Procedure 17.

Local Law No. 1—1973 was adopted by the Town of Smithtown pursuant to Chapter 40 of the Laws of 1970, effective September 1, 1970, after the New York State Legislature amended its Penal Law Sec. 245.01 and 245.02 permitting:

> ". . . the adoption by a . . . town . . . of a local law prohibiting the exposure of a female substantially as herein defined in a public place, at any time, whether or not such female is entertaining or performing in a play, exhibition, show or entertainment."

The local law in question is, therefore, clearly authorized and sanctioned by the Penal Law. In fact, the sole purpose of amending the Penal Law was to grant authority to the local governments to enact local laws in furtherance of the state-wide policy relative to this activity.

The district court's declaration of unconstitutionality of Local Law No. 1—1973 necessarily constitutes a determination that those portions of sections 245.01 and 245.02 of the Penal Law which expressly provide for local action such as is here challenged are also unconstitutional.

Various local laws have been enacted throughout the State of New York in accord with the state policy enunciated in sections 245.01 and 245.02 of the Penal Law.[4] See *Brandon Shores, Inc.* v. *Inc. Village of Greewood Lake,* 68 Misc. 2d 343, 325 N.Y.S.2d 957 (Local Law No. 4 of the Village of Greenwood Lake).

The declaration of the court below that Local Law No. 1—1973 is unconstitutional, read in conjunction with this Court's decision in *Salem Inn, Inc.* v. *Frank* —— F.2d ——, No. 73-2436 (2d Cir., June 25, 1974) will necessarily have impact upon the future enactment and continued enforcement of law adopted locally, but in pursuance and in furtherance of a state-wide policy.

This state-wide policy against public lewdness has been part of the state's Penal Law since 1909 and was readopted as part of the revision of its Penal Law effective September 1, 1967 under Article 245—"Offenses Against Public Sensibilities." The state-wide policy was revised to permit local municipalities to adopt local laws as is the one under appeal, when the New York State Courts held that the Penal Law, as then enacted prior to Chapter 40 of the Laws of 1970, was pre-empted by the State. See McKinney's Cons. Laws of New York, Book 39, Pocket Part, Penal Law Sec. 245.01, Supplementary Practice Commentary, p. 75.

Therefore, a three-judge court is appropriate. *Sailors* v. *Bd. of Ed., County of Kent,* 387 U.S. 105 (1967). The police department and the prosecuting attorney seek to enforce a state-wide policy. The Town's implementation of its

---

[4] A non-exhaustive survey of the Towns of New York State, exclusive of cities and villages, reveals the following towns have adopted the same or similar "anti-topless local law or ordinances" evidencing a substantial statewide policy and/or concern: Towns of Babylon, Bedford, Brandon, Colonie, Creetowaga, Callicoon, Eastchester, Forestberg, Gates, Hempstead, Henrietta, Limberland, Moreau, North Hempstead, Ossining, Oyster Bay, Rotterdam, Southampton, Tusten, Warwick, Webb.

police power, as authorized by the Penal Law of New York, is clearly the exercise of a state-wide function. *Spielman Motor Sales Co.* v. *Dodge,* 295 U.S. 89 (1935); *Moody* v. *Flowers,* 287 U.S. 97 (1967). The three-judge court, as provided in 28 U.S.C.A. 2281, can alone consider the questions of constitutionality of Local Law No. 1—1973 with its state-wide interweaving with Penal Law Sec. 245.01 and 245.02, before the final consideration of whether an injunction should be granted.[5] Whether viable or not, a three-judge court is required to determine the questions raised by plaintiffs in their petition for declaratory relief and the incidental relief of injunction. *Krzewincki* v. *Kugler* (D.C. N.J. 1972), 338 F.Supp. 492, 496. Even if the determination is to dismiss the complaint under the principles of *Younger* v. *Harris,* 401 U.S. 37 (1971), the three-judge court must be convened. *Steffel* v. *Thompson,* —— U.S. ——, 42 L.W. 4357, 4359 n.9.

The decision of the court below should be reversed and direction given for the convening of a three-judge federal court.

CONCLUSION

The order of the District Court enjoining the enforcement of Town of Smithtown Local Law No. 1—1973 should be reversed.

Respectfully submitted,

HOWARD E. PACHMAN
Special Counsel to the
Town of Smithtown
6143 Jericho Turnpike
Commack, New York 11725
(516) 864-5900

---

[5] After due notice and participation of the state's Attorney General, 28 U.S.C.A. 2284/2.

ADDENDUM

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- x

GAJON BAR & GRILL, INC. and JAMES FRANCIONE, :

Plaintiffs, :

- against - : 74 C 476

EUGENE KELLY, individually and in his capacity as Police Commissioner of the County of Suffolk, State of New York; PAUL J. FITZPATRICK, individually and as Supervisor of the Town of Smithtown; VINCENT J. TRIMARCO, individually and as Town Attorney of the town of Smithtown; ROBERT HOSS, individually and as a member of the Suffolk County Police Department; and EMIL ORTOLANI, individually and as a member of the Suffolk County Police Department, :

Defendants.

- x

United States Courthouse
Brooklyn, New York
April 4, 1974
10:00 o'clock a.m.

B E F O R E:

HONORABLE J. BRUCHHAUSEN

HENRI LE GENDRE
OFFICIAL COURT REPORTER

APPEARANCES:

WALTER G. STEINDLER, ESQ.
Attorney for Plaintiffs

HOWARD E. PACHMAN, ESQ.
Special Counsel to defendants
Paul J. Fitzpatrick and
Vincent J. Trimarco

PATRICK SWEENEY, ESQ.
Attorney for Defendants
Kelly, Hoss and Ortolani.

* * * * *

MR. PACHMAN: I am special counsel for the town of Smithtown. The only concern that I have, we were meeting today only on the issue of the injunction and we were not getting into any other grounds. The order to show cause was only returnable on that issue.

THE COURT: I didn't recall that.

MR. PACHMAN: The declaratory action is still pending separate and distinctly. The argument that Mr. Steindler had was always to take issue and that's theonly issue I was ready to meet. I feel this belongs with a three Judge court.

MR. STEINDLER: While Mr. Pachman may have been prepared under Younger and the Samuels case --

THE COURT: Do you have briefs?

MR. PACHMAN: I submitted it to the Clerk.

MR. STEINDLER:: The issue is the unconstitutionality of the statute in order to show that this is one of the exceptions. This is why we have proceeded on that score. We are aware of the Younger case and the Samuels case, our position is that we meet the exceptions which are irreparable harm --

MR. PACHMAN: If and when we get to that issue of irreparable harm, whether irreparable harm has been shown, I believe on the papers there is not even a

prima facie case, only a claim of financial harm. I think if that issue comes in we have to have a separate and distinct hearing.

THE COURT: I have a number of injunction cases and I also appreciate Rule 65 and that comes up very heavily in practically all those cases, I'll say that.

MR. PACHMAN: Your Honor, may I suggest this; an effort to expedite your problem of having this matter pending, we have submitted certain papers to the court. If after the court reviews the papers and feels that more argument, more papers should be submitted, I'll prefer to work it on that basis, come back on another day when the court would have more time and argue at that particular time.

THE COURT: I would certainly approve of that. That has been a course that has been followed.

MR. PACHMAN: I'd rather handle it on that informal basis.

THE COURT: I have had some complex cases. You may have heard thecases involving the patrolmen of Nassau and Suffolk, 8600 patrolmen, policemen are involved in pay rise and it's a controversy with the cost of living, counsel, and we have taken a great deal of testimony on many phases of that case, so,

of course, irreparable harm came up quite often in that case, I'll say that. I would pursue that course. I think that would be practical.

MR. STEINDLER: Our only concern is the time limit, without going into it in detail, there are prosecutions pending and this is one of the reasons we show that we are out of the exception.

THE COURT: I think it was mentioned in your papers.

MR. STEINDLER: We now have a date of April 25th for only one of the cases; a May 2nd date for another and if for some reason the first case isn't tried on April 25th it would be something in July. This is one of our additional reasons for applying to this court, that we are not going to be able to resolve that rapidly in a state proceeding.

THE COURT: I would make every effort to render a ruling by that time.

MR. PACHMAN: To accomodate Mr. Steindler I'll do everything possible to see that they are ready to try that case and I believe Mr. Sweeney representing the police department will do everything in his power to get the police ready on that date so they could have their state proceeding which is our argument.

They should be in the state court. I think we'll do everything possible to try thecase if Mr. Steindler would be ready with his client.

THE COURT: If you'll submit your papers, decision will be reserved.

MR. STEINDLER: There is only one factual situation which was raised by the affidavit of Mr. Fitzpatrick which we would like to correct. He indicates that only one of two dancers were arrested in contravention to our statement; that there were two arrests of the plaintiff and two arrests involving two different matters. As one of the attorneys or associated with the attorney of record for the dancers, there are in fact two dancers who were arrested and are charged as opposed to one.

MR. PACHMAN: You gave me theinformation.

MR. STEINDLER: I have theutmost respect for Mr. Pachman. I know this wasn't intentional that Miss BAnks was in fact arrested and I believe it's her case that is on for May 2nd.

MR. PACHMAN: We'll check that out.

MR. STEINDLER: I have copies of the information. I have for the Court the copy of the information with reference to Miss Banks. I'm sorry I don't have two

copies of it. We would submit that to indicate the second arrest.

THE COURT: Alright. Thank you.

(Whereupon the matter was concluded.)

Court Press Form No. 2-Affidavit.
H.15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GAJON BAR & GRILL, INC. and JAMES FRANCIONE,

Plaintiffs-Appellees,

against

EUGENE KELLY, individually, etc.,

Defendant,

and

PAUL J. FITZPATRICK, etc.;
VINCENT J. TRIMARCO, etc.,

Defendants-Appellants,

and

ROBERT HOSS, etc., et al.,

Defendants.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAM being duly sworn, deposes and says that he is over the age of 18 years. That on the 4th day of September, 1974, he served two copies of the Brief of Defendants-Appellants on Belli, Sarisohn, Creditor, Carner, Thierman & Steindler the attorneys for the Plaintiffs-Appellees by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. 1020 East Jericho Turnpike, Commack ( ) N. Y., that being the address designated by them for that purpose upon the preceding papers in this action.

Irving Lightman

Sworn to before me this
4th day of September, 1974.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976